

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60704

FILE: B-185157

DATE: April 1, 1976

MATTER OF: Frank Coluccio Construction Company, Inc. 99118

DIGEST:

Although solicitation requirement for listing of pipe suppliers is not fully met by low bidder who lists two possible suppliers for certain categories of pipe, award may be made to low bidder. Facts show that listing requirement was inadvertently included in solicitation by agency and that second low bidder who complied fully with listing requirement was not prejudiced thereby. Moreover, listing requirement serves no valid purpose for Government where item being procured is commercially available as in instant case.

Frank Coluccio Construction Company, Inc. (Coluccio) has protested the proposed award of a contract to the Perini Corporation (Perini) by the Bureau of Reclamation, Department of the Interior (Interior), under Specifications No. DC-7155 for the construction of the Spring Hill Distribution System, Tualatin Project, Oregon. Coluccio, the second low bidder, contends that the low bid submitted by Perini should be rejected as nonresponsive for failure to comply with the pipe supplier listing requirement specified in the solicitation.

The invitation, insofar as is pertinent to this protest, called for the furnishing and laying of approximately 41 miles of pipe of 6 through 60 inch diameter. The contractor was allowed (with certain exceptions) the option of furnishing different classes of pipe, including reinforced concrete pressure pipe, pretensioned concrete cylinder pipe, asbestos-cement pressure pipe, steel line pipe, or ductile iron pipe for line pipe. Classes of pipe were denoted by symbols representing engineering requirements at a particular location in the pipeline, including the diameter of pipe, earth loading and hydrostatic head. Bidders were required to list the pipe option and "symbol" or class of pipe to be furnished by each pipe and pipe fittings supplier, along with the supplier's name and address. The solicitation required that the successful bidder

agree not to have any of the listed categories of pipe and pipe fittings supplied by any supplier other than the one named as the supplier of such pipe and pipe fittings. Thus, the listing was intended to preclude bid shopping, and the solicitation warned bidders that failure to submit this list by bid opening time would make the bid nonresponsive.

Perini listed Ameron as its supplier for pretensioned concrete cylinder pipe and Certain-Teed as its supplier of asbestos-cement pressure pipe, with R.H. Baker as the supplier of the asbestos-cement pipe fittings. However, the bid did not indicate which class or symbol of pipe each supplier would furnish for the option indicated.

Coluccio contends that the Perini bid is nonresponsive because it only listed the names and addresses of suppliers of pipe options but failed to specify the range of sizes and symbol of pipe to be furnished by each option supplier. Coluccio asserts that Perini's failure to comply fully with the listing requirement allows it to purchase the symbol pipe required from whichever of the listed suppliers that offers the lowest price at the time of purchase. Specifically, Coluccio equates the requirement for the listing of suppliers in the instant case with the construction subcontractor listing requirements of previous solicitations which our Office has determined to be a material requirement. Since the requirements and conditions of both clauses are virtually identical (the only difference being that the latter refers to subcontractors performing construction tasks while the former refers to suppliers of pipe), and both were designed to eliminate post award "bid shopping", Coluccio contends Perini's failure to comply with the requirement rendered its bid nonresponsive.

At the outset, Interior concedes that the purpose of requiring bidders to list their suppliers of symbol pipe and pipe fittings was to prevent "bid shopping" and that Perini's manner of complying with the requirement may have allowed the bidder to bid shop among its listed suppliers by changing the pipe option for the symbol pipe to be furnished. Nevertheless, Interior asserts that Perini's bid conformed to the substance, if not the form, of the requirement, in that Perini's ability to bid shop would be restricted to the two pipe options for which it listed suppliers. Furthermore, while there is an overlap in the pipe sizes which could be supplied

by either of the two suppliers listed in Perini's bid, Interior states that it has been the experience of the Bureau that Certain-Teed will furnish the option of pipe for which it is listed in sizes up to and including 24 inches in diameter and that Ameron will furnish only its pipe option in sizes larger than 24 inches. Coluccio contests the accuracy of this statement by referring to its own bid which lists Ameron as the supplier of pipe of 18 inches in diameter and above and Certain-Teed as the supplier of pipe with a diameter of less than 15 inches.

In our opinion, Perini's bid does not meet the solicitation requirement for listing the portion that each of the listed suppliers would furnish where more than one supplier is named for the same category of pipe and pipe fittings. Since the Government's solicitation sought the right to require the successful bidder to furnish pipe only from the supplier named for the particular category of pipe, we must conclude that Perini's bid does not satisfy the listing requirement.

Interior also argues, however, that although the language of the solicitation indicates otherwise, full compliance with the listing requirement is not considered essential. It reports that the Bureau of Reclamation had been including the pipe supplier listing requirement on an experimental basis, since a similar requirement for listing of construction subcontractors had been authorized by regulation, 41 CFR 14-7.602-50(1) (1975). Interior points out that while in construction contracts the prevention of bid shopping may be in the Government's interest because substitution of a construction subcontractor after award may result in inferior workmanship or other cost-cutting measures, it believes that the Government need not be concerned about bid shopping where the subcontractor is merely a supplier of standard materials. Although Coluccio contends that neither Certain-Teed nor Ameron is a middleman or wholesaler providing "off-the-shelf" items, Interior points out that the solicitation's requirements will be furnished by suppliers of standard pipe. It reports that Ameron and Certain-Teed are regularly engaged in the manufacture of various categories of pipe and that the instant pipe is commercially available even though requests would be met either from stock or by special manufacturing runs.

We have held that the requirement for listing subcontractors does not encompass suppliers of standard electrical equipment to be furnished in connection with an electrical modernization contract with the Government. 49 Comp. Gen. 120 (1969). We interpreted the listing requirement in that case as extending only to

manufacturers and fabricators whose products were specially made to conform to the Government's specifications rather to firms which merely furnish combinations of standard items. Implicit in the cited decision is the recognition that no valid purpose exists for requiring the listing of suppliers of essentially standard items. We therefore agree with Interior's position that the listing requirement is unnecessary in this case since the evils of bid shopping are insignificant in the context of items generally supplied to the public.

Moreover, we think similar considerations are pertinent to the question whether a bidder complying with the pipe listing requirement would be significantly prejudiced if a noncomplying bid is accepted. In this connection, we also note that both Perini and Coluccio listed identical suppliers of pipe and that the Government would merely waive its right to require the bidder to commit itself to one of the two listed suppliers for only a portion of the pipe. There has been no evidence brought forth indicating unfair competitive practices by either of the listed pipe suppliers. Furthermore, we note that while Coluccio's total bid was more than \$300,000 higher than Perini's, Coluccio's price for the furnishing and laying of pipe was approximately \$446,000 lower than Perini's bid for that portion of the contract. In view of the protester's significantly lower bid for the furnishing and laying of pipe it does not appear to be prejudicial to the protester if Perini were allowed the flexibility of choosing between the two identical pipe suppliers intended to be used by Coluccio for the limited portion of pipe which both suppliers are capable of furnishing.

Finally, we recognize that an award which negates a requirement considered to be material under the terms of the solicitation tends to undermine the integrity of the bidding system. However, we are convinced that the listing requirement was inadvertently included in the solicitation. Prior to issuance of this solicitation, Interior had revoked 41 CFR 14-7.602-50(1), which authorized the listing of subcontractors. 40 Fed. Reg. 29722 (1975). Interior has pointed out that the reasons for this change in policy were published in 40 Fed. Reg. 17848 (1975) and included many of the problems that have surfaced here. The publication cited the fact that bidders had difficulty understanding and complying with the requirement, which resulted in the submission of nonresponsive low bids, numerous protests against award and delays in programs.

B-185157

It is significant from the point of view of the integrity of the bidding system that the Department had changed its overall policy with respect to the need to prevent bid shopping prior to issuance of the solicitation. We trust this change of policy will be consistently adhered to in its future procurements and we are recommending that the agency take appropriate corrective action.

In all of the circumstances, we agree with Interior that Perini's bid may be accepted as submitted.

R. F. Keller
Deputy Comptroller General
of the United States